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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT MARLAN MACKEY, Defendant and Appellant.	A098469 (Contra Costa County Super. Ct. No. 011609-5)

I. INTRODUCTION

Defendant Robert Marlan Mackey was convicted of manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)). He challenges his conviction on the ground that the trial court erred when it failed to order the disclosure of certain confidential informants. We disagree and affirm the judgment of conviction.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution Case*

On August 30, 2001, at around 10:30 p.m., Concord police officers executed a search warrant at a house and a detached garage behind the house. When the police searched the garage, they noticed a smell like a methamphetamine laboratory. During the search of the garage, the officers heard noises coming from behind a partition in the garage. Officers walked out of the garage and towards a back room. Through an open door to the back room, they observed indicia of a methamphetamine laboratory. The laboratory contained methamphetamine, as well as precursors and byproducts of the

manufacturing process. The officers also discovered three backpacks inside the laboratory containing manufacturing materials.

Around the time the officers in the garage came across these materials, officers in position behind the house saw defendant jump over the property's back fence. After finding him in the backyard of an adjacent property, the officers detained defendant. Another individual, Donald Sitzmann, also tried to escape over the fence before being detained.

The officers discovered indicia of a methamphetamine "cook" inside Sitzmann's hip pack. Sitzmann's fingerprints were also discovered on items confiscated from the methamphetamine laboratory. A swab taken from Sitzmann's hands tested positive for the presence of methamphetamine. Defendant smelled of a strong odor identified as typical of a methamphetamine laboratory. His jacket also tested positive for the possible presence of the drug in trace amounts.

A police expert testified that, in his opinion, the garage's back room was being used to manufacture methamphetamine for the purpose of sale. He also testified that it was unlikely methamphetamine was being sold from the room.

B. ***Defense Case***

Defendant denied manufacturing methamphetamine or helping Sitzmann manufacture methamphetamine. Defendant testified that he knew Sitzmann as a friend of the people who lived in the house next door to defendant. On August 30, at around 10:00 p.m., he went next door to use the telephone. He saw a light on in the back room of the garage. Four days prior to this he had been inside this room. However, at that time, the room was not set up as a methamphetamine laboratory.

Defendant knocked on the door to the back room, thinking the people who lived in the house were inside. Sitzmann told him to come in and to shut the door. When defendant closed the door, he saw what Sitzmann was doing. Defendant left after about a minute. Defendant returned home and then decided to go back to the house to buy some methamphetamine from Sitzmann. While he was in the laboratory, defendant was splashed with some muriatic acid.

Defendant testified that after he had been in the laboratory for about four minutes, he heard the police announce their presence. He ran from the room and jumped over the fence.

Defendant was found guilty of manufacturing methamphetamine and not guilty of possessing components to manufacture methamphetamine. The trial court found true allegations that defendant had sustained a prior conviction for a controlled substance offense and that he was ineligible for probation after having sustained two prior felony convictions. The court sentenced defendant to six years in state prison.

This timely appeal followed.

III. DISCUSSION

Defendant's only contention on appeal is that the trial court improperly denied his motion to disclose the identity of three confidential informants relied on by the police in obtaining the search warrant. We disagree.

Whether the trial court's denial of a motion to disclose the identity of a confidential informant on appeal is subject to de novo review or is reviewed for abuse of discretion is not settled. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1245–1246, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.) Accordingly, we will review the court's ruling in this case de novo.

It is well established that "the prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges against the defendant. [Citation.] An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. [Citation.] The defendant bears the burden of [producing] ' " 'some evidence' " ' on this score. [Citations.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 159–160.) A " '. . . defendant's showing to obtain disclosure of an informant's identity must rise above the level of sheer or unreasonable speculation, and reach at least the low plateau of reasonable possibility.' [Citation.]" (*People v. Luera* (2001) 86 Cal.App.4th 513, 526.) "The existence of a 'reasonable possibility' an informant could provide exonerating evidence must be determined on a

case-by-case basis. [Citation.]" (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1610, overruled on another point in *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867.)

"When, in [a] criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. . . . During the hearing, . . . the prosecuting attorney may request that the court hold an in camera hearing. . . . The court shall not order disclosure, . . . nor dismiss the criminal proceeding . . . unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (Evid. Code, § 1042, subd. (d).)

"It is incumbent on the defendant to make a prima facie showing for disclosure before an in camera hearing is appropriate." (*People v. Oppel* (1990) 222 Cal.App.3d 1146, 1152.) "[A]n in camera review procedure is specifically authorized when the defendant is seeking disclosure of the identity of a confidential informant 'on the ground the informant is a material witness on the issue of guilt.' ([Evid. Code,] § 1042, subd. (d).)" (*People v. Hobbs* (1994) 7 Cal.4th 948, 963.) Subdivision (d) of Evidence Code section 1042 "provides that where the defendant demands disclosure of the identity of a confidential informant 'on the ground the informant is a material witness on the issue of guilt' . . . , a hearing must be held, and it must be conducted in camera and outside the presence of the defendant and his counsel if the prosecution so requests. If the asserted privilege of nondisclosure of the informant's identity ([Evid. Code,] § 1041) is upheld, the transcript of the hearing and any evidence presented therein must be ordered sealed, and neither such evidence nor the identity of the informant may be disclosed to the defense 'unless, based upon the evidence presented [at the hearing], the court concludes that there is a reasonable possibility that nondisclosure might deprive defendant of a fair trial.' " (*People v. Hobbs, supra,* at p. 961, fn. omitted.)

In this case, the trial court concluded defendant failed to make out a prima facie case as to one of the confidential informants (referred to as CI–1). The court held an in

camera hearing regarding the other two confidential informants (referred to as CI–3 and CRI–2).

The trial court did not err in finding no prima facie case had been established regarding the informant referred to as CI–1. Seven months before defendant was arrested, CI–1 described to the police two occasions (both in January 2001) on which the informant had seen Sitzmann manufacturing methamphetamine. The informant did not provide any information regarding defendant.

Although defendant suggests that the informant's observations of the methamphetamine manufacturing process seven months earlier might yield potentially exculpatory evidence, the case against defendant was based on the events of August 30, 2001. Having neither "viewed . . . the commission or the immediate antecedents of [defendant's] alleged crime" (*Williams. v. Superior Court* (1974) 38 Cal.App.3d 412, 423), the informant could not provide exonerating evidence on the issue of defendant's guilt. The trial court did not err in concluding that there was not a reasonable possibility this informant could exonerate the defendant.

As for the other two informants, we have reviewed the transcript of the in camera hearing, as well as the proceedings in open court. We conclude the trial court's denial of disclosure was not in error. "[W]hen an in camera hearing has been held and the trial court has reasonably concluded, as in [this] case, that the informant does not have knowledge of facts that would tend to exculpate the defendant, disclosure of the identity of the informer is prohibited by Evidence Code section 1042, subdivision (d), since the public entity . . . invoked the privilege pursuant to [Evidence Code] section 1041." (*People v. McCarthy* (1978) 79 Cal.App.3d 547, 555.)

IV. DISPOSITION

The judgment is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Stein, J.